

# EFFECTIVE METHODS OF ALTERNATIVE DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND ARBITRATION<sup>1</sup>

By: Amelia Martin Adams (Copyright © 2010)

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The term “alternative dispute resolution,” often referred to as “ADR,” encompasses a wide variety of methods by which parties on opposing sides of a dispute may be able to resolve their issues in a confidential manner without resorting to costly and time-consuming litigation. Although there are many types of ADR, the most common forms are negotiation, mediation, and arbitration, and others, such as med-arb and collaborative law, are also becoming quite popular. Regardless of which form a party chooses to pursue, ADR can be a very effective tool for assisting disputing parties with settling their differences both efficiently and equitably. This article provides a quick overview of the more common types of ADR: negotiation, mediation, and arbitration.

**Negotiation.** The most widely-used form of ADR is negotiation, which is simply “the process of refining and agreeing to the issues and establishing a range of compromise options.”<sup>2</sup> Although attorneys are often retained to assist parties with the negotiation process, negotiations take place every day without legal representation, making them a very attractive form of ADR to disputing parties. Negotiations vary in level of formality, with some taking place over the course of a few informal meetings or phone conversations, and others through a series of written settlement offers issued pursuant to a pending lawsuit. Whatever the formality, by far the biggest advantage of negotiation is that the parties completely control the process in this form of ADR. In addition to controlling the level of formality, parties to a negotiation also control the tempo of their discussions, the settlement options they entertain, and the ultimate outcome of their dispute.

Although the level of preparation necessary for negotiation will vary depending upon the complexity of the issues at stake, the first step in any successful negotiation must be an in-depth review of the relevant facts. Parties should take care to not only review the facts relevant to their side of the argument, but also to those of all other parties, to ensure that they are fully aware of all possible issues. Next, the parties should determine who should be their main negotiator: the parties themselves, their attorneys, or some other representative. The primary negotiator should be experienced in negotiation, very familiar with the dispute, and/or very familiar with the opposing party. Once selected, the parties should work with the negotiator to determine a varied range of settlement options, while keeping in mind the best and worst alternatives and the parties’ ultimate goals. The parties should also evaluate what their next step will be in the event negotiations prove unsuccessful.

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<sup>1</sup> This article is a service for friends and clients of DeLCotto Law Group PLLC. The opinions expressed in this article are intended for general guidance only and not as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance.

<sup>2</sup> PONTE, LUCILLE M. AND THOMAS D. CAVENAGH, ALTERNATIVE DISPUTE RESOLUTION IN BUSINESS 29 (West Educational Publishing Company) (1999).

After the background work is completed, the next steps are to determine a mutually agreed upon time and place for the negotiation and to evaluate who should be present at the meeting (if such a formal meeting is desired). If possible, it is best to have the decision-makers present at the negotiation so that they are a part of all discussions that take place. New facts and issue are often brought to light during negotiations, and if the decision-makers are present, they will be better able to make any on-the-spot decisions that the new information may require. To that end, all parties to the negotiation process should remember that in order to maximize the benefits of the negotiation, or most other forms of ADR, flexibility is key. By their very nature, negotiations virtually always involve some degree of concession by all parties, and staying flexible is the best way to ensure that a party reaches the best result possible.

Negotiations often require multiple meetings, telephone conversations, or letters before an agreement is reached. However, once the negotiations have concluded, the parties should be willing to enter into a written agreement formalizing their decisions. Each interested party should take great care in evaluating the final agreement to ensure that he or she is satisfied with its terms and able to abide by them. If so, the agreement should then be signed by all interested parties, and copies should be made for each party to keep. If disputes related to the agreement subsequently arise, parties are encouraged to return to the negotiation stage or to consider an alternative method of dispute resolution before resorting to legal action to have them resolved.

**Mediation.** Mediation is the second most widely used ADR technique. Although it still allows disputing parties considerable flexibility in reaching a resolution, mediation is quite a bit more structured and formalized than general negotiation because it employs a neutral, third-party mediator to assist the parties with reaching a consensual agreement.<sup>3</sup> However, the mediator's role is not to unilaterally decide on the appropriate resolution to the parties' dispute.<sup>4</sup> Instead, the mediator acts as a facilitator who guides disputing parties' discussions in order to assist them with "understanding the nature of the problem, the underlying interests of all parties, and the various options that may exist which can help resolve all, or part, of the problem."<sup>5</sup> By doing so, the mediator is often able to help the parties uncover the interests underlying each party's positions, and thereby assist the parties with formulating a collective settlement agreement that satisfies each of the parties to the fullest extent possible.

As with negotiation and virtually every other type of dispute resolution, the first steps in the mediation process are to evaluate all of the relevant facts and issues, from both sides of the dispute, and to determine the goals the party hopes to achieve through mediation. Next, the party should select an appropriate mediator. Mediators each use their own unique styles to assist disputing parties with reaching a resolution. Some mediators follow the "facilitative" model, in which the mediator's role is to facilitate communication between the parties in order to assist them with reaching a mutual resolution. Others follow the more direct "evaluative" model, in which the mediator takes a more active role by instructing the parties as to what he or she believes to be the best outcome, either by providing strong arguments for a position or rejecting

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<sup>3</sup> See KRS 446.010(41).

<sup>4</sup> *Id.*

<sup>5</sup> ORDOVER, ABRAHAM P. AND ANDREA DONEFF, ALTERNATIVES TO LITIGATION: MEDIATION, ARBITRATION AND THE ART OF DISPUTE RESOLUTION 8, (National Institute for Trial Advocacy) (2d. ed 2002).

settlement options developed by the parties. Others follow the recently-developed “transformative” model, which focuses on the relationship of the disputing parties and helps them to move beyond their disputes by developing a better understanding of and empathy for one another while reaching a mutual agreement. Determining which of these styles best suits a party’s issues is often vital to the success of the mediation, so the party should be sure to take into account what type of mediator fits his or her case before making a selection. Additionally, in the event that a dispute involves highly-technical issues, it may be in the parties’ best interests to select a mediator with a great deal of background knowledge in that field.

Once a mediator has been selected, he or she will typically work with the parties to determine an appropriate time, place, and location for the mediation session. As with negotiation, it is very important that the party with decision-making ability be present at the mediation so that he or she may participate in all discussions and determine what settlement options best fit the facts and satisfy the party’s goals. The mediation session will typically begin with a “joint session.” First, the mediator will give a short introduction outlining the form of the session and his or her role in it. Next, each party will be allowed to give an opening statement outlining his or her version of the facts and desires for settlement. Depending upon several factors, the mediator may then choose to talk with the parties separately in “caucus” sessions or allow the parties to continue together in the joint session. Either way, the mediator will then work with the parties to help them further establish goals and assist them with reaching those goals through settlement.

Although sometimes disputes may be settled in only one mediation session, they often continue on for several sessions before the parties finally determine whether an agreement can be reached. If the parties do agree, the mediator will then typically draft a document formalizing the parties’ agreements for the parties to review and sign. If not, the mediator will generally encourage the parties to evaluate whether they will be satisfied with how the dispute will proceed following an unsuccessful mediation. By doing so, parties are often prompted to resolve any lingering issues in the mediation, instead of resorting to further litigation or simply leaving their issues unresolved.

**Arbitration.** Although there are similarities between the two, arbitration differs substantially from mediation because it employs a neutral decision-maker or panel of decision-makers who, after reviewing evidence and hearing arguments from all interested parties, are given the power to impose their determination as to how a dispute should be resolved. Arbitrators are typically attorneys, retired judges, or experts in the field of study at issue in the arbitration, but they are generally not required to come from any one specific background. Arbitration is typically private and brought about by agreement, can be binding or non-binding, voluntary or court-ordered, and in Kentucky, is generally governed by the Uniform Arbitration Act,<sup>6</sup> as well as any additional rules created by the parties. Binding arbitrations are typically entered into by a voluntary agreement wherein the parties agree that the arbitrator’s decision on the dispute is final and generally not subject to court review. Non-binding arbitrations, however, are usually those that are ordered by a court. After the arbitrator makes a decision in a non-binding arbitration, the parties will usually have a specified period of time in which they may object to the decision before it becomes a final judgment. If an objection is made, the court will

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<sup>6</sup> KRS 417.045, *et seq.*

then hold a new trial on the matter as if no arbitration had ever been conducted. Due to the time and expense incurred by the court in holding such a trial, the objecting party will often have to pay some sort of penalty or fee along with his or her objection.

The complexity of the arbitration process may differ depending on the particular facts and circumstances of each case. Although disputing parties can agree to arbitrate their issues at any time, the decision to arbitrate instead of proceeding with litigation is frequently made by a binding contract or agreement that governs the parties' relationship before any dispute between them ever arises. Regardless of how the decision to arbitrate comes about, preparation for the arbitration is quite similar to preparing for litigation. Facts are reviewed and analyzed, discovery is often completed, witnesses must be prepared for testimony, and the parties' attorneys must be thoroughly versed in the relevant facts and applicable law. Additionally, some private arbitrators require the parties to exchange preliminary "pleadings," such as a demand for arbitration filed by the initiating party and a responsive answer filed by the responding party to outline defenses and counterclaims.

Once the preliminary matters are finished, the arbitrator will determine an appropriate time and location for the arbitration. Although arbitrations are not held in courtrooms, they are usually held in "hearing rooms" that can be quite similar. The arbitrator or panel of arbitrators will be seated at the head of the room, and each party will be given the opportunity to present his or her case to the arbitrator or panel. The process typically begins with a short introduction of the arbitrators and their roles. The arbitrators may also explain the process in further detail so that all participants know what to expect. The remainder of the arbitration will usually proceed in much the same manner as a formal trial, beginning with opening statements by each party's attorney, followed by the examination of witnesses, and ended by closing statements. Arbitrators may also ask the parties to prepare supplemental legal briefs regarding particular legal issues. The formal rules of evidence traditionally do not apply, but attorneys would be wise to use those rules as guidelines.

The entire arbitration process can often be accomplished in a very short period of time, but many cases may require a longer process due to the complexity of issues and amount of evidence to be presented. Once the arbitrators have reviewed all evidence, they issue a decision with either binding or non-binding precedent, depending upon the parties' agreement to arbitrate and/or any related court orders. As previously noted, if the agreement is binding, the arbitrator's decision is generally final. Although binding arbitration decisions can be reviewed by courts, the judiciary has traditionally granted deference to arbitrators' decisions, and only in extreme situations have courts considered overturning them. If the arbitration is not binding, the parties will usually have a specified period of time to object to the decision, and if no such objection is made, the decision will become final after the time period expires.

Hopefully, this short overview of the more common methods of alternative dispute resolution will assist the reader in analyzing the ways that ADR can be used in resolving a wide variety of issues. For more information about this topic or how it could help to resolve your financial issues, please contact Amelia Martin Adams at [aadams@dlgfir.com](mailto:aadams@dlgfir.com) or any of the other attorneys at DelCotto Law Group.